IN THE HIGH COURT OF BOMBAY AT GOA

COMPANY PETITION NO. 16 OF 2006

Osnar Paints and Contractors
Pvt. Ltd., A Company incorporated
under the Companies Act, 1956, having
its registered office at T. K. Industrial
Estate, Acharya Donde Marg, Sewree,
Mumbai – 400 015. ... Petitioners

versus

Western India Shipyard Limited
having its registered Office and Shipyard
at P. O. Box No.21, Mormugao Harbour,
Goa – 403 003. ... Respondent

Mrs. A. A. Agni and Mr. M. A. Prabhudesai, Advocates for the Petitioner.

Mr. V. A. Lawande, Advocate for the Respondent.

CORAM : N. A. BRITTO, J.

DATE : 15TH JUNE, 2007.

ORAL JUDGMENT

Heard the learned Counsel on behalf of both the parties. This petition was filed for the winding up of the respondent company under Section 433(e) of the Companies Act, 1956 on the allegation that the respondent was indebted to the petitioner in the sum of Rs.41,48,696.25 as on 15-7-2005 with interest at the rate of 18% per year but the claim is now restricted only to

Rs.20,68,015.70 which is payable to the petitioner as per bill dated 20-4-2004. In other words, the petitioner has abandoned its claim in the sum of Rs.61,181.25 and Rs.19,500/- of bills dated 15-4-2004 and 11-5-2004, respectively.

2. There is no dispute that the petitioner, a sub-contractor, was entrusted the job of external painting which included the erection of scaffolding, chipping of rust scales prior to blasting followed by fresh water washing etc. of Rig known as Pride Pennsylvania by virtue of two work orders dated 6-12-2003 and an agreement dated 1-1-2004.

3. By virtue of the first work order the petitioner was assigned an area of 11,055 sq. meters at an estimated cost of Rs.41,45,625/- and by the second work order an area of 15090 sq. meters estimated at Rs.45,27,000/-. The date of completion of work was stipulated as 28-2-2004 but the petitioner's work was completed on 19-4-2004 and the petitioner raised the bill dated 20-4-2004. Admittedly, the petitioner completed the work to the extent of only 12,158 sq. meters as against allotted work of 26,145 sq. meters and the balance work was got done by the respondent through M/s. Palongi and Company and regarding which the petitioner has raised no dispute and this prima facie shows that all was not well with the work being carried out by the petitioner pursuant to the said two work orders and the agreement.

4. The petitioner called upon the respondent by notice dated 7-6-2005 to pay the said amount of Rs.41,48,696.95 and thereafter it appears that there were meetings between the representatives of both the petitioner and the respondent and the respondent deducted an amount of Rs.10,32,023/- being due to the respondent largely towards the supply of consumables supplied to the petitioner which according to the respondent had to be paid by the petitioner. That made the petitioner to send a second notice dated 15-7-2005 again claiming the said sum of Rs.41,48,696.95. The receipt of the first notice is admitted by the respondent and the receipt of the second notice has not been specifically denied by the respondent and therefore can be taken as having been admitted, to have received the same.

5. As far as the difference of the amount claimed in the notice and the amount now restricted in the petition, Mr. Lawande, the learned Counsel on behalf of the respondent, has fairly conceded, relying upon **Ofu Lynx Ltd.** v. **Simon Carves India Ltd**.(AIR 1970 Calcutta 418) that claiming an amount in the notice which is more than claimed in the petition would not render the notice invalid. The learned Counsel on behalf of the respondent has also relied on an unreported decision of this Court dated 15-9-2006 in Company Petition No. 1-N of 2002 in the case of **Mr. N. N. Valechha** v. **M/s. I. G. Petrochemicals Ltd**. This Judgment would be relevant as it affirms out three propositions. The first is that unless the statutory notice served on a company under Section 432 of the Companies Act is in conformity with the mandatory requirements of Section 434(1)(a) of the Act, the presumption under the Section as to the Company's

inability to pay its debts cannot be raised. Secondly, apart from the legal fiction of Section 434(1)(a) it is open to a petitioner to make and prove an alternative claim that the company is unable to pay its debts. The third is that the procedure prescribed under Section 433 of the Companies Act is of summary nature and detailed investigations which are required to be made, the appropriate forum to do the same is the Civil Court. A winding up petition is not a legitimate means to recover a debt which is bona fide disputed by the company and a petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed and under the circumstances may be stigmatized as a scandalous abuse of the process of the Court and wherever a claim of debt is disputed the proper forum for that is a Civil Court. Reference could also be made to the Judgment of this Court in **P. G. Bhatia & Co.** v. **Softsule Private Ltd.**(1977 Company Cases 438(Vol.47)) and of the Supreme Court in **Amalgamated Commercial Traders(P) Ltd.** v. **A. C. K. Krishnaswami and another**(1965 Company Cases 456(Vol.XXXV)) wherein it has been held that if a debt is bona fide disputed there cannot be “neglect to pay” within the meaning of Section 434(1)(a) of the Companies Act, 1956 and if there is no neglect, the deeming provision does not come into play, and the ground of winding up, namely, that the company is unable to pay its debt, is not substantiated.

6. As per the respondent, the bill as per Work Completion Certificate dated 19-4-2004 has been paid to the petitioner after carrying out verification and damages as stipulated in the terms of the agreement and the work purchase orders. As per the respondent, they are entitled to a sum of Rs.10,58,696.95

which they have deducted from the outstanding bills for damages for breach of the agreement, for workmanship and delay in completing the job and that they had by letter dated 12-3-2004 warned the petitioner of the said damages for failure to complete the quartz blasting and painting within the stipulated time. The respondent has also deducted a sum of Rs. 10,32,023/- towards consumables, medical expenses, store rental charges, etc. and have deposited a sum of Rs.25,671/- before this Court and according to Mr. Lawande, the learned Counsel on behalf of the respondent, the respondent has no objection in case the said amount is ordered to be paid to the petitioner. In view of the said submission, the said sum of Rs.25,671/- deposited by the respondent by virtue of Order dated 30-3-2007 shall be paid to the petitioner, with accrued interest, if any.

7. The next question to be examined therefore is whether the deductions made by the respondent in the sum of Rs.10,32,023/- and Rs.10,58,696.95 are bona fide.

8. As far as the first sum of Rs.10,32,023/- which has been deducted by the respondent mostly towards consumables, it may be noted that this sum was never accepted by the respondent and in fact even prior to the first notice dated 7-6-2004 the respondent by their letter dated 4-12-2004 had informed the petitioner that nothing was due to them. Thereafter there was a meeting between the representatives of the petitioner and the respondent soon after the service of the first notice by the petitioner upon the respondent and when the

representatives of the respondent had also admitted that as per the respondent, the net amount which will be paid to the petitioner will be Rs.25,671/- after the said deduction of Rs.10,32,023/-. In terms of Clause 7 of the agreement between the parties, consumables were to be issued by the respondents free of cost only for the standard consumption quantities. Any excess consumption beyond the standards specified in the Annexure to the agreement would be debited at double the issue rate to the Sub-contractor's account. Clause 3 of the said agreement, inter alia, provided that on completion of the job, a Work Done Certificate indicating the details of the job carried out, including consumption of material and consumables, shall be submitted to the concerned department of the Company before the departure of the vessel from the yard. As per Clause 24 of the said agreement, the Company was to have first a paramount lien on all or any money that becomes due and payable to the Sub-contractor under this or any other contract and such dues would be adjusted against any monies becoming due to the respondents by the sub-contractor for reason and in consequence of abandonment, default, delay, damages or penalties whatsoever. It is not the case of the petitioner, at least in the petition, that they had not used any excess or unjustified consumables or for that matter they had submitted a certificate as required by Clause 3 of the agreement. On behalf of the petitioner, it is contended that no reference was made on Work Completion Certificate of the excess consumables used by the petitioner. Similarly, it is contended that consumption of consumables in excess is not reflected in letter dated 4-12-2004. It is further contended that it was for the respondent to prove that the petitioner had used consumables in excess for which the petitioner was bound to pay and

therefore it cannot be said that the deduction is bona fide. The contentions cannot be accepted. The fact that respondent made no mention in this letter about the consumables used by the petitioner is no indication that no consumables were used by the petitioner either of standard quantities or in excess for which it is the petitioner who was required to give a Certificate. In any event, it must be stated that this dispute would require a detailed investigation to be done and therefore cannot become a subject matter of a company petition.

9. As regards the sum of Rs.10,58,696/-, there also appears to be serious disputes between the parties. Although, the petitioner raised the bill on or about 20-4-2004 it appears that it was never accepted on behalf of the respondent. It also appears that the very cause for sending the legal notice dated 7-6-2005 appears to be the respondent's letter dated 4-12-2004. By this letter dated 4-12-2004 the petitioners were inter alia informed that the contract was not completed by the petitioner by the time frame specified by the owners and that the labour force engaged by them through subcontracting had realized that the task was difficult and had started leaving the yard without completing the areas allocated to them and that machinery, especially the compressors was giving way quite often and hence were not able to operate efficiently leading to further delays. It was also mentioned that the petitioner was able to complete only 20% of the tank internals and 40% of the externals and the respondent had to contract the services of M/s. Pallonji and Co. to complete the external surface preparation and painting. The petitioner was also informed that they had gone through their invoice submitted by them and found that the respondent did not

owe to the petitioner any money than what was paid to the petitioner. In other words, even prior to the notice dated 7-6-2005, the respondents by their letter dated 4-12-2004 had made clear to the petitioner that they did not owe any money to them. The petitioner was also informed that they were considering of imposing the cost of the re-works of the areas of failed coating upon the petitioner and that they would be getting in touch with them on that aspect shortly. The petitioner was also informed that the petitioner's performance was extremely poor and had not benefited either of their companies and that it was unfortunate that the petitioner should be writing a letter to them claiming for additional money over and above what was paid to the petitioner. The petitioner was further informed that the project of surface coating on “Pride Pennsylvania” was a thorough failure due to the petitioner's incompetence and lack of dedicated approach.

10. The very first letter on record dated 5-2-2004 from “Pride Pennsylvania” shows that the spray coating of the tank had proceeded without final blast inspection clearance either from them or from Pride International and that no stripe coating of all edges and welds and corroded surface profiles was carried out prior to the spray coat. It was also stated that the resulting paint application was poor, with many of the difficult to access areas still showing corrosion through either newly applied paint or no paint in these areas(holidays). It was also mentioned that great efforts were needed to ensure the contractor lifts his game before they could release more tank work to this contractor and that reasonable results could be achieved if the right combination of skill,

dedication and equipment are in place. In other words, this letter prima facie shows that the work carried out by the petitioner was not at all satisfactory. By another letter dated 6-2-2004, the respondent was informed on behalf of Pride Pennsylvania that the contractor was not strong and was struggling to complete the work which was also the observation of the supervisors of the respondent and that the petitioner was holding up the progress of all subsequent work on the port aft side and the petitioner needed to be replaced if they were to make any headway. By letter dated 7-2-2004, the petitioners apologized for the lapses in their job and informed the respondent that all remedial measures would be taken to rectify the same. No doubt, by letters dated 12-2-2004 and 16-2-2004 the petitioner complained that no sufficient work was being released to them and at the same time noted that the work of external water cleaning on the aft side below water tank No.37A prior to commencement of blasting which they were to commence on that day was allocated to another contractor. By letter dated 17-2-2004, the respondent referred to the petitioner's letter dated 16-2-2004 and informed the petitioner that their progress was slow and lagging behind and that the tanks that have been cleared have not been completed. The petitioner was further informed that the petitioner would not be granted permission to demobilize manpower, machineries and resources. By letter dated 5-3-2004 the petitioner requested the respondent that they be given flat bottom hull for blasting and painting as per contractual terms since they had 14 air compressors and 115 workmen. By letter dated 12-3-2004, the respondent informed the petitioner that there was shortage of qualified manpower for carrying out the job, contrary to the petitioner's claim of idle manpower. The petitioner was also

informed that the capability of the petitioner was not at all acceptable to them as well as to their client(Pride Pennsylvania). The letter dated 17-3-2004 addressed to the petitioner shows that 7 tanks were still to be chipped, blasted and painted besides 2 tanks where still renewal has been carried out. It was also stated that another 4 tanks were still untouched and were lying unattended for quite some time. By the last letter dated 25-3-2004, before the Works Completion Certificate was prepared, the respondent informed the petitioner that they had not been able to come up to their expectations and had badly let them down. The respondent also informed the petitioner that hardly 25% of the total quantity of blasting and painting was done and the quality is also far from satisfactory and that they did not know how to overcome this shortfall of not meeting their commitment to Pride Pennsylvania.

11. Reference has been made to the above correspondence on record only to indicate that there has been serious disputes between the petitioner and the respondent as well as the owners of Pride Pennsylvania as regards delay and unsatisfactory completion of work for which the respondent has deducted the said sum of Rs.10,58,696/-. Prima facie, they would be justified in doing so as demonstrated by them by the correspondence produced. In any event, it must be stated that the petitioner's bill as per completion certificate was not accepted by the respondent at any time and even prior to the first notice dated 7-6-2005 the respondent by his letter dated 4-12-2004 had clearly indicated to the petitioner that the respondent did not owe them any money than what was paid to them and as already stated the notice dated 7-6-2005 came to be sent only

thereafter and presumably to pressurize the respondent to pay to the petitioner the amount claimed, part of which has not been pressed for. Whether the petitioner would be entitled to the said two sums of money could be decided only if detailed investigations are made which cannot be done in this summary proceedings. The respondent's claim for deductions of the said two sums against the bill presented by the petitioner appears to be prima facie bona fide. In **I.T.C. Ltd.** v. **Fomento Resorts and Hotels Ltd.**(1991 Company Cases 459)(Vol. 70)) this Court has held that it is well settled that a winding up petition should not be allowed to be resorted as a means to recover debts from a company and the claim in a winding up petition should not be a running claim but one which is crystallized. It is only after a creditor establishes that a debt is clear, valid in law, unimpeachable and undisputable that the creditor is entitled to a winding up order ex debito justitiae but if the debt is disputed and the dispute is bona fide and genuine, no winding up order can be made. Neglect to pay is not equivalent to omission to pay, for it requires that such omission is without reasonable cause or valid excuse. As far as the facts of that case go, the Court also observed that it was apparent from the company's letter dated 4-11-1988, that in the course of such discussions, the company had disputed several claims made by the petitioner and had raised several counter claims and thus it could not be denied that the dispute was raised by the company much before statutory notice was served on them and hence, in the background of the prolonged discussions for the settlement of accounts, the defence raised was genuine and bona fide. The same position is reflected in this case as well since the bill presented by the petitioner was never accepted by the respondent company and soon after the

first notice a sum of Rs.10,32,023/- was deducted towards consumables, medical expenses, store rental charges, etc. and subsequently another sum of Rs.10,58,696/- was deducted towards damages which prima facie appears to be in consonance with Clause 30 r/w Clause 24 of the agreement.

12. The petition has been filed only to exercise pressure to pay the said bill. The dispute raised by the respondent appears to be bona fide and it also involves disputed questions of fact which can be gone into only in a fullfledged inquiry before the Civil Court which is not the scope of summary proceedings like a winding up petition.

13. The petition is therefore hereby dismissed with cost of Rs.5000/-. The petitioner is at liberty to withdraw the said sum of Rs.25,671/- with accrued interest, if any.

N. A. BRITTO, J.

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